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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000134-001 DT 07/27/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
K. Waldner
Deputy

STATE OF ARIZONA

v.

DANIEL WARREN EVANS (001)

JACK PEMBERTON

DANIEL WARREN EVANS
4365 E PECOS RD #130
GILBERT AZ 85295

GILBERT MUNICIPAL COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number 2010–CT–21416.

Defendant-Appellant Daniel W. Evans (Defendant) was convicted in Gilbert Municipal Court of assault and disorderly conduct. Defendant contends (1) the charging document was not sufficiently specific, (2) the State did not present sufficient evidence to support the convictions, and (3) the trial court erred in ordering restitution. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On November 19, 2010, the State filed a complaint charging Defendant with two counts of assault, A.R.S. § 13–1203(A)(1) & (A)(3), and one count of disorderly conduct, A.R.S. § 13–2904(A)(1). On August 12, 2011, Defendant's attorney filed a Notice of Readiness stating he was ready to go to trial on August 17, 2011, and there were no pre-trial issues to be resolved.

At the start of the trial, both attorneys said there were no issues the trial court needed to address. (R.T. of Aug. 17, 2011, at 4.) The prosecutor waived opening statement, and Defendant's attorney made an opening statement, which included the following:

> And with that in mind, Your Honor, at the conclusion of the case, I think you'll agree with me that my client was entitled to do what he did. There was no assault and there was no disorderly conduct, particularly in light of the fact that in the three counts there's no designated alleged victim. And with that in mind, we're ready to go.

(R.T. of Aug. 17, 2011, at 7.)

Kimberly Dutcher testified she was previously married to Defendant. (R.T. of Aug. 17, 2011, at 8–9.) She did not remember the events of February 7, 2010, and said she has had speech, memory, and balance problems since that date. (*Id*. at 9–10, 32–33.) As a result of her injuries, she missed 9 weeks of work, and was not able to go back to her regular routine. (*Id*. at 11.)

K.E. testified she was the daughter of Kimberly Dutcher and Defendant and was in the seventh grade. (R.T. of Aug. 17, 2011, at 13–14, 26.) On February 7, 2010, she was in the kitchen making Valentines, Kimberly was in the kitchen making dips, and Defendant was in the living room watching the Super Bowl. (*Id*. at 14–15, 28.) Her younger brother M.E., age 6, was outside throwing rocks into the swimming pool, so Defendant went outside to discipline M.E. by hitting him in the head. (*Id*. at 15–16, 26–27, 41.) Kimberly went outside and told Defendant not to hit M.E., and Defendant and Kimberly began to argue. (*Id*. at 16, 28–29.) They returned to the living room and continued to argue, and Defendant began chasing Kimberly around the table. (*Id*. at 16–17, 30, 35.) Ultimately, Defendant pushed Kimberly, who fell to the floor, which was marble, and hit her head. (*Id*. at 18–19.) Defendant then got on top of Kimberly. (*Id*. at 19–20.) S.S., who is Defendant's step-daughter, came down the stairs, and began helping K.E. and M.E. try to get Defendant off Kimberly. (*Id*. at 20–21, 31–32, 38.) Defendant did not hit K.E., but he did push S.S. (*Id*. at 39.) S.S. used a cell phone to call 9-1-1, and shortly after that the police arrived. (*Id*. at 21–22, 40.) The paramedics later arrived and took Kimberly away on a stretcher. (*Id*. at 23.)

S.S. testified she was 20 years old, and had been living with her mother, Kimberly, and Defendant for about 3 months. (R.T. of Aug. 17, 2011, at 42–44.) On February 7, 2010, she was upstairs in her room when she heard M.E. crying and Kimberly and Defendant arguing. (*Id*. at 45–46, 56.) She ran down the stairs and saw Kimberly on the floor with Defendant on top of her. (*Id*. at 46, 56–57.) S.S. told Defendant to get off her mother and pushed him, whereupon Defendant pushed her back. (*Id*. at 47, 57.) She described Defendant as 6'4" or 5" and 280 pounds, and described herself as 5'1" and 120 pounds. (*Id*. at 48.) S.S. said she used a cell phone to call 9-1-1. (*Id*. at 49.) The paramedics later arrived, and Kimberly was taken by helicopter to a hospital. (*Id*. at 51–52.)

Officer Adam Dyas testified he was an officer with the Gilbert Police Department, and on February 7, 2010, after 5:00 p.m., he was dispatched to investigate an incident. (R.T. of Aug. 17, 2011, at 66–67.) When he arrived at the house, he heard a male and a female yelling, and once the door opened, he saw Kimberly with a dazed expression on her face. (*Id*. at 69.) Officer Dyas spoke to Defendant, who essentially claimed he acted in self-defense. (*Id*. at 71–73.)

Justin Welch testified he was a firefighter and received a call on February 7, 2010. (R.T. of Aug. 17, 2011, at 74–75.) He said Kimberly seemed confused and complained of head pain, and had what appeared to be a bite mark on her hand and a hematoma on the left side of her head. (*Id*. at 78–79, 83.) Kimberly said she had fallen and struck her head on the floor. (*Id*. at 81.) She was taken by ambulance to a local hospital, and then taken by helicopter to St. Joseph's Medical Center. (*Id*. at 84.)

After presenting those witnesses, the State rested. (R.T. of Aug. 17, 2011, at 85.) Defendant's attorney then made a "perfunctory" motion for judgment of acquittal:

> MR. BLACK: Before I put my client on, Your Honor, I just need to make a perfunctory Rule 20 motion with regard to Counts 1, 2, and 3, that there aren't any designated victims, so I move for a Rule 20 judgment of acquittal on that.
>
> . . . .
>
> MR. BLACK: Nothing other than I think they ought to designate who the victims are in each of the three counts.

(R.T. of Aug. 17, 2011, at 85.) The trial court denied Defendant's motion. (*Id*. at 85–86.)

Defendant then testified and gave his version of the events, essentially claiming self-defense. (R.T. of Aug. 17, 2011, at 87, 98–105, 118–24.) After testifying, Defendant rested. (*Id*. at 129.) During closing argument, Defendant's attorney again made a motion for judgment of acquittal, this time providing the trial court with a published opinion (*State v. Klokic*). (*Id*. at 135–38, 142.)

After hearing arguments from the attorneys, the trial court denied Defendant's motion for judgment of acquittal, noting this was a bench trial and not a jury trial, and specifically finding Kimberly was the victim in Count 1 (assault), K.E. and S.S. were the victims of Count 2 (disorderly conduct), and S.S. was the victim in Count 3 (assault). (R.T. of Aug. 17, 2011, at 149–50.) The trial court then found Defendant guilty of all three counts. (*Id*. at 150.)

Prior to sentencing, the trial court addressed the issue of restitution. The parties stipulated Kimberly would receive $2,183.97. (R.T. of Dec. 15, 2011, at 4, lines 5–7.) The State requested restitution for leave Kimberly used in the following amounts: $1,820.56 for vacation leave; $5,234.11 for sick leave; and $361.11 for a floating holiday; for a total of $7,415.78. (*Id*. at 7, 16.) A number of Kimberly's fellow employees donated leave in the amount of $8,602.15 for her to use, but the State specifically stated it was not requesting restitution for that donated leave. (*Id*. at 6, 15–16.)

The trial court then awarded Kimberly the stipulated amount of $2,183.97. (R.T. of Dec. 15, 2011, at 36.) It ordered restitution for the vacation leave, sick leave, and floating holiday in the total amount of $7,415.78 to be paid to Kimberly's employer. (*Id*. at 37.) It also ordered restitution of $165 for the airplane ticket for S.S. to attend the proceedings. (*Id*. at 26, 37.) The trial court imposed no other restitution amounts. (*Id*. at 37.) The trial court then imposed sentence. (*Id*. at 37–39.) On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

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II. ISSUES.

A. *Has Defendant waived any issue concerning the charging document.*

Defendant contends the charging document was not sufficiently specific because it did not list the name of each victim for each count. The Arizona rules provide, "No issue concerning a defect in the charging document shall be raised other than by a motion filed in accordance with Rule 16." Rule 13.5(e), ARIZ. R. CRIM. P. They further provide, "All motions shall be made no later than 20 days prior to trial . . . ." Rule 16.1(b), ARIZ. R. EVID. The Arizona Supreme Court described this requirement as follows:

> Anderson argues that the indictment counts charging armed robbery, conspiracy to commit murder, and first-degree murder were each duplicitous. An indictment is duplicitous if it charges more than one crime in the same count. Duplicitous indictments are prohibited because [1] they fail to give adequate notice of the charge to be defended, [2] present the potential of a non-unanimous jury verdict, and [3] make a precise pleading of prior jeopardy impossible in the event of a later prosecution.
>
> State contends that Anderson waived these arguments. We agree. . . .
>
> Anderson did not renew his attack on the indictment before the second trial. Instead, he first raised the issue at the close of the State's case-in-chief in a motion for acquittal pursuant to Arizona Rule of Criminal Procedure 20. The superior court denied the motion, ruling that Anderson had waived the argument by not raising it prior to trial.
>
> Arizona Rule of Criminal Procedure 13.5(e) provides "[n]o issue concerning a defect in the charging document shall be raised other than by a motion filed in accordance with Rule 16." Rule 16.1(b) requires that such motions be filed at least 20 days before trial; Rule 16.1(c), in turn, provides that any motion not timely filed is "precluded."
>
> We require pretrial objections to an indictment in order to allow correction of any alleged defects before trial begins. If a defendant makes a timely objection, the State can remedy any duplicity by filing a new indictment charging multiple counts, thus exposing a defendant to multiple penalties.
>
> Because the first appeal left the issue unresolved, Anderson was not relieved of the obligation to raise the objection anew after remand. By failing to object before the second trial, Anderson traded the risk of a non-unanimous jury for the reward of only one potential sentence on each of the challenged counts and therefore waived any objection.

State v. Anderson, 210 Ariz. 327, 111 P.3d 369, ¶¶ 13–18 (2005) (citations omitted).

In the present case, Defendant's attorney specifically told the trial court there were no issues the trial court needed to address prior to trial. (R.T. of Aug. 17, 2011, at 4.) Defendant's attorney knew the Complaint did not list any victims in the three counts, specifically referring to that fact in his Opening Statement. (*Id*. at 7.) It thus appears Defendant's attorney specifically chose not to raise that issue before the start of the trial. As did the attorney in *Anderson*, Defendant's attorney

did not raise that issue until he made a motion for judgment of acquittal at the close of the State's case. (*Id*. at 85.) If Defendant's attorney had raised this issue before trial, the State easily could have identified which person it considered to be the victim of each count. Because Defendant's attorney did not raise this issue prior to trial, Defendant has waived it.

If a defendant has waived the issue of the charging document by failing to make a timely objection, the defendant is entitled to relief on appeal only if the defendant is able to establish fundamental error. *State v. Paredes-Solano*, 223 Ariz. 284, 222 P.3d 900, ¶ 6 (Ct. App. 2009). Fundamental error is limited to those rare cases that involve error going to the foundation of the defendant's case, error that takes from the defendant a right essential to the defendant's defense, and error of such magnitude that the defendant could not possibly have received a fair trial, and places the burden on the defendant to show both that error existed and that the defendant was prejudiced by the error. *State v. Soliz*, 223 Ariz. 116, 219 P.3d 1045, ¶ 11 (2009). If the charging document is not sufficiently specific, (1) it does not provide adequate notice of the charge to be defended, (2) presents a hazard of a non-unanimous jury verdict, and (3) makes a precise pleading of prior jeopardy impossible in the event of a later prosecution. *State v. Davis*, 206 Ariz. 377, 79 P.3d 64, ¶ 54 (2003); *accord, Anderson* at ¶ 13; *Paredes-Solano* at ¶ 17; *State v. Klokic*, 219 Ariz. 241, 196 P.3d 844, ¶ 12 (Ct. App. 2008). This Court concludes Defendant has failed to establish any error, much less fundamental error.

First, the Complaint taken together with the State's discovery indicated which person was the subject of each count. Count 1 charged assault under A.R.S. § 13–1203(A)(1) by causing physical injury to another person. Defendant had the State's discovery, which showed the only person injured was Kimberly Dutcher. Count 3 charged assault under A.R.S. § 13–1203(A)(3) by touching with the intent to injure, insult, or provoke, and the State's discovery showed that person was S.S. Count 2 involved disturbing the peace or quiet of a family or person, and again the State's discovery showed the persons whose peace was disturbed. Further, Defendant's attorney made no claim that he did not know which person was the subject of each count, and his defense to each count was the same: self-defense. Defendant thus had adequate notice of the charges to be defended, and has failed to show any prejudice.

Second, there was no danger of a non-unanimous verdict. Because the verdicts were rendered by only one person (the trial judge), there is no way each verdict could be anything other than unanimous.

Third, there was no danger it would be impossible to plead prior jeopardy in the event of a later prosecution. The trial court specifically found Kimberly was the victim in Count 1 (assault), K.E. and S.S. were the victims of Count 2 (disorderly conduct), and S.S. was the victim in Count 3 (assault). Further, the statutory time limit within which to charge misdemeanors such as these is 1 year. A.R.S. § 13–107(B)(2). The event in question happened November 19, 2010, so the time has long past for the State to bring any charges arising out of this event. Defendant has thus failed to show pleading prior jeopardy would be a problem, and has failed to show any prejudice. Defendant has thus failed to establish any error, fundamental or otherwise.

B. *Did the State present sufficient evidence to support the convictions.*

Defendant contends the State did not present sufficient evidence to support the convictions. An appellate court will not reverse a conviction for insufficient evidence unless there is no substantial evidence to support the verdict. *State v. Scott,* 187 Ariz. 474, 477, 930 P.2d 551, 554 (Ct. App. 1996), *citing State v. Hallman,* 137 Ariz. 31, 38, 668 P.2d 874, 881 (1983). Substantial evidence is more than a mere scintilla, and is what a reasonable person could accept as sufficient to support a guilty verdict beyond a reasonable doubt. *State v. Hughes,* 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Montano,* 204 Ariz. 413, 65 P.3d 61, ¶ 43 (2003), *quoting State v. Tison,* 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981). When considering whether a verdict is contrary to the evidence, this court does not consider whether it would reach the same conclusion as the trier-of-fact, but whether there is a complete absence of probative facts to support its conclusion. *State v. Mauro,* 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

In the present case, the evidence showed Defendant cause an injury to Kimberly, and did so at least recklessly. The evidence showed Defendant pushed S.S. away when she tried to help Kimberly, which showed he touched her with the intent to injure, insult, or provoke. Finally, the evidence showed K.E. and S.S. were at peace and quiet before these events occurred, and that Defendant engaged in fighting, violent, or seriously disruptive behavior knowing that would disturb the peace and quiet of K.E. and S.S. The evidence was such that a rational trier-of-fact could have found the essential elements of the charges beyond a reasonable doubt.

C. *Did the trial court err in ordering restitution.*

Defendant contends the trial court erred in ordering restitution in that he claims the trial court ordered him to pay restitution for employees who donated sick leave for Kimberly to use. The record does not support Defendant's contention. The record showed Kimberly's fellow employees donated leave in the amount of $8,602.15 for her to use, but the State specifically stated it was not requesting restitution for that donated leave. (R.T. of Dec. 15, 2011, at 6, 15–16.) Further, the record showed Kimberly used vacation leave in the amount of $1,820.56; sick leave in the amount of $5,234.11; and leave for a floating holiday in the amount of $361.11; for a total of $7,415.78, and that was the amount of restitution the trial court ordered. (*Id*. at 7, 16, 38.) The trial court thus did not order Defendant to pay restitution for sick leave that Kimberly's fellow employees donated.

III. CONCLUSION.

Based on the foregoing, this Court concludes (1) Defendant waived any issue about the charging document and that it was sufficiently specific, (2) the State presented sufficient evidence to support the convictions, and (3) the trial court did not err in ordering restitution.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Gilbert Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Gilbert Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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